

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 August 2008

Public Authority: The Office of Fair Trading
Address: Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Summary

The complainant requested information from the Office of Fair Trading (the "OFT") about a case involving Seabeach Limited, which he believed the OFT was investigating. The OFT refused his request, neither confirming nor denying whether it held such information, under section 44 and 31 of the Freedom of Information Act 2000 (the "Act"), in reliance on Part 9 of the Enterprise Act 2002. The Commissioner's decision is that the OFT was correct both to rely on sections 44 and 31 to neither confirm nor deny whether it held the requested information. However, the Commissioner finds that the refusal notice issued was issued in breach of section 17(1) and 17(3).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. On 15 November 2006 the complainant expressed concern about the activities of a company named Seabeach Limited ("Seabeach") and stated that he had read that it was under investigation by the Office of Fair Trading (OFT). He made the following request to the OFT:

"Can you please let me have information about this case?"

3. On 17 November 2006 the OFT refused the complainant's request, stating that since any such information it might hold was restricted from disclosure by Part 9 of the Enterprise Act 2002 (the "EA02"), it was exempt from disclosure under

section 44 of the Act. The OFT further suggested that the complainant might consider contacting a relevant Trading Standards Department for information.

4. The complainant made a request for an internal review, received by the OFT on 23 November 2006.
5. On 2 January 2007 the OFT provided the complainant with the outcome of its internal review. It upheld its original refusal. The OFT's letter clarified that disclosure of information of the type sought was prohibited under Part 9 of the EA02 and would amount to a criminal offence. The letter cited sections 237 and 238 EA02 in support, stating that the information he requested amounted to "specified information". The OFT also restated that any information was therefore exempt under section 44 of the Act; an absolute exemption. However it neither confirmed nor denied whether it was investigating Seabeach or not.
6. On 4 January the OFT wrote again to the complainant, referring him to a case: *Dey vs. the Information Commissioner and the OFT, EA/2006/0057* which was due to be heard by the Information Tribunal on related issues. The OFT also recommended that the complainant contact the Trading Standards Service for further information about the company in question, and copied to him two pertinent OFT press releases on bogus charity collectors.
7. The OFT wrote a further letter to the complainant on 7 February 2007 stating that it had reviewed the case again. In respect of any information about Seabeach which may be held by the OFT and which might have come to the OFT in the exercise of its functions, the OFT maintained that section 44 of the Act applied. However in respect of other information which was the subject of the complainant's request, the OFT now considered that section 44 did not apply and that section 31 applied instead.
8. The complainant responded to the OFT in February 2007 stating that he disagreed with the content of its latest letter.

The Investigation

Scope of the case

9. On 3 January 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - He argued that the information was already in the public domain since he had found "several worried comments" on the internet and that "One stated publicly that the company was under investigation by the OFT".
 - The public need to know if there is or is not an official investigation ongoing; or even intended, into its activities".
 - The principle about the interpretation of the Freedom of Information Act seems to me more important than the specific case.

10. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

11. On 30 January 2007 the Commissioner requested from the complainant copies of further background documents, which the complainant sent to him on 5 February 2007.
12. On 3 October 2007 the Commissioner began his investigation by writing to the OFT to request further information about and clarification of its refusal of the complainant's request, including its application of the public interest test. The Commissioner also requested a copy of any withheld information. He particularly asked the OFT to clarify the evolution of and the differences between its original refusal and internal review and the revised view it took in its letter to the complainant dated 7 February 2007. The Commissioner also asked for further information relating to the application of the EA02, including the functions which the OFT would exercise in this type of situation and the objects of an investigation of this type. In addition the Commissioner asked whether or not the OFT had considered the circumstances in which disclosure might be permitted under EA02, if information was held.
13. The OFT responded to the Commissioner on 30 October 2007. The OFT explained that it had revised its earlier views following further consideration of the information request in the light of continuing correspondence with the complainant. This review concluded that it had erroneously applied section 44 to all the information which might be held within the subject of the request. Information which the OFT itself may have generated was not covered by section 44 since it would not have "come to" the OFT as specified by section 238 of EA02 and therefore would not be subject to the restrictions in section 237 EA02. The OFT submitted that section 31 would apply to information of this type, referring back to its arguments in its letter to the complainant dated 7 February 2007. However, the OFT refused the Commissioner's request to receive a copy of any information it may have withheld from the complainant, since it reiterated the point that disclosure of any such information would be a criminal offence under Part 9 EA02. Instead it stated it would disclose any such information, if held, on receipt from the Commissioner of a valid Information Notice under section 51 of the Act.
14. On 16 January 2008 the Commissioner issued an Information Notice under section 51 of the Act requiring the OFT within 30 days to furnish him with a copy of:

"any information it had holds about Seabeach relevant to the information request made by the complainant on 15 November 2006."
15. The OFT responded to the Information Notice on 15 February 2008.

Findings of Fact

16. The OFT has refused to neither confirm nor deny whether it holds any information about an investigation into Seabeach. OFT explained that in carrying out investigations into firms such as this, it would hold information falling into two categories:
- Information which has come to the public authority in the exercise of its functions which relates to the affairs of an individual
 - Information generated internally by the OFT
17. OFT explained that in relation to any investigation which it may or may not have carried out into Seabeach, it could hold information falling into both categories. It would therefore consider that section 44 would apply to the first category of information which may or may not be held and section 31 would apply to the second.

Analysis

Exemptions: Section 44 'Prohibitions on Disclosure'

18. Section 44(1) (a) provides that information is exempt if its disclosure is prohibited by or under any enactment. Section 44(2) of the Act provides that the duty to confirm or deny that information is held does not apply if the confirmation or denial itself would fall within any of the provisions of 44(1). The OFT states it is prohibited under part 9 section 237 of the EA02 from disclosure of 'specified information' as defined by section 238.
19. The OFT explained that if it revealed that it had or had not investigated a company, then it could be revealing something about the affairs of that company and therefore 'specified information' about it, whether OFT went on to disclose the information or not. This would fall within section 44(1) (a) and therefore section 44(2) exempts OFT from the duty to confirm or deny in this case.
20. Section 237 of the EA02 states that 'specified information' must not be disclosed unless the disclosure is permitted under this Part. Section 238 defines specified information as information that has come to the OFT in connection with the exercise of any function it has under or by virtue of (a) Part 1, 3, 4, 6, 7 or 8; (b) an enactment specified in Schedule 14 or (c) such subordinate legislation as the Secretary of State may, by order, specify for the purposes of this subsection
21. The Information Tribunal promulgated its decision in the *Dey* case on 16 April 2007, upholding the Commissioner's Decision Notice in that case, and therefore confirming that where information was "specified information" under section 238 of EA02 then disclosure was prohibited under section 237 and hence exempt under section 44 of the Act. The Commissioner has also distinguished between the application of the Act to information OFT receives and information OFT

generates. Information OFT receives falls within the definition of “specified information”

22. The Commissioner has therefore first decided whether the information, if held, falls into the definition of specified information. The OFT explained that some of the information which may or may not be held would have been received by it in the exercise of its functions it, particularly section 8, or under other specific consumer protection legislation. Those functions include receiving, considering and, where appropriate, investigating complaints.
23. The Commissioner accepts as a fact that any “specified information” under section 238 EA02 would have come to the OFT in connection with the exercise of its functions as defined in that section; i.e. those under Section 8 of EA02 and under other consumer legislation, involving “receiving, considering and, where appropriate, investigating complaints”. The Commissioner accepts that to confirm or deny if information is held would result in the disclosure of ‘specified information’ and that the OFT is therefore exempt from the duty to confirm or deny by virtue of section 237 of the EA02.
24. Section 237(3) of the EA02 allows for disclosure of information if the information has on earlier occasion been disclosed to the public; Section 239 allows for disclosure if the OFT has obtained consent and section 241 states that the OFT may disclose information for the purpose of facilitating the exercise by it of any function it has under or by virtue of this Act or any other enactment.
25. However, whilst these gateways to disclosure exist under EA02 they give a power to the OFT to disclose information, rather than imposing a duty. Therefore the OFT is not under a duty to consider whether a gateway to disclosure applies. This point had also been confirmed in *Dey* where the Tribunal stated in respect of a gateway: “It gives a power to disclose, not a duty.” In any event, the OFT further argued that even if a gateway applied, disclosure would not be in the public interest.
26. The Commissioner accepts as a fact that whilst gateways exist for disclosing information none of the gateways would apply in this case as the OFT would have been under no duty to consider them.
27. The Commissioner accepts that the EA02 prevents the OFT from confirming or denying if information is held. Section 44 is therefore engaged.

Section 31 ‘Law enforcement’

28. Section 31(1) (g) provides that information which is not exempt by virtue of section 30, is exempt if its disclosure would, or would be likely to prejudice the exercise by any public authority of its functions for any of the specified purposes in subsection 2. OFT have identified that the purposes specified in subsection (2) are those at (a), (b) and (c):

- (a) the purpose of ascertaining whether any person has failed to comply with the law
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

29. The OFT have not applied section 30 and the Commissioner is satisfied that section 30 does not apply in this case. The OFT reviewed the case following internal review and acknowledged that some of the information which may or may not be held in this kind of case would have been internally generated by the OFT. Any such information would be information which the OFT created, rather than information which had come to it. The OFT considered that the provisions of section 31 would apply to any such remaining information, rather than section 44.
30. Section 31 (3) provides that the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in section 31 (1). The Commissioner has considered the likelihood of prejudice being caused if the OFT were to confirm or deny if information is held and what information is held. In reaching his decision the Commissioner has applied the test for 'would be likely to prejudice' as set out in the Tribunal decision EA/2005/005 *John Connor Press Associates vs. the Information Commissioner*. The Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (Para 15). This was further expanded in the Tribunal decision *Hogan vs. the Information Commissioner EA/2005/0026* and *Bexley vs. the Information Commissioner EA/2006/0060*.
31. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the chance should be greater – more probable than not.
32. The OFT explained that the effectiveness of its investigations depended on the maintenance of confidentiality and ensuring free and frank correspondence with traders under investigation. In particular the OFT identified two areas in which it considered that if it were to confirm or deny that the information is held regarding investigations into Seabeach its functions would be prejudiced:
- Traders would seek to evade detections, to conceal or tamper with evidence and or to interfere witnesses; and
 - It would reduce its ability to effectively engage with traders.
33. OFT argue that the starting point must be that routine disclosure of whether traders are under investigation would enable traders simply to ask the OFT and then to take steps to ensure their wrongdoing evades detection. This would be

likely to prejudice the OFT's ability to exercise its functions for the purposes set out above. The OFT argued that in relation to this request public confirmation that the OFT is or is not investigating Seabeach would create a significant risk that the company would become aware that the OFT was or was not investigating any unlawful elements of its commercial operations. As above OFT explained that if it confirms there is an investigation Seabeach could take steps to evade detection and if it confirms there is no investigation it could be seen as tacit endorsement, or at least *de facto* security for its operations.

34. Further the OFT argued that even if there are cases where confirming that an investigation is underway will not prejudice that investigation there will be many cases where such disclosure will cause such prejudice. This would include such cases where there is evidence to suggest the trader will destroy evidence, interfere with witnesses or disappear completely. The OFT explained that any refusal to confirm or deny holding information would be undermined if in cases where there is no investigation the OFT confirms this. If the OFT neither confirms nor denies only in one category of cases but confirms in others that no information is held, that will betray that information **is** held in the former category
35. The Commissioner agrees that section 31 (3), in conjunction with 31(1) (g) and 31(2) (a) (b) and (c), is engaged in respect of information which might be held by the OFT, having been generated by it in respect of an investigation. He accepts that there would be a real risk of prejudice to the OFT's investigative and regulatory functions if it were to confirm or deny if such information is held, since these functions are dependent on confidentiality and openness in communications between the OFT and traders.

Public Interest Test

36. Section 31 is a qualified exemption and is therefore subject to the public interest test. The Commissioner has therefore gone on to consider if the public interest in maintaining the exemption does or does not outweigh the public interest in confirming or denying if information is held.
37. The OFT maintain that the public interest in maintaining the exemption outweighs the public interest in disclosure. The OFT acknowledged that there might be a public interest in informing the public about the work of the OFT, although it asserted that it had taken decisions to disclose information in the public interest in specific instances; for example, press releases already provided to the complainant.
38. Against disclosure, the OFT argue that there is a strong public interest in maintaining its ability to investigate traders, so ensuring that it can effectively carry out its function of protecting consumers. It reiterated that whilst it acknowledged there were strong arguments favouring confirmation as to whether information was or was not held it considered the contrary arguments weighed against this. Those arguments against confirming whether information was held included the strong public interest inherent in ensuring the OFT could carry out its investigative and enforcement work effectively. The OFT cited in support Awareness Guidance published by the Commissioner which quoted law

enforcement and police investigations as examples of situations where the duty to confirm or deny could impede effectiveness. It stated it regarded its own investigative functions as analogous to those of the police.

39. The OFT further argued that no public interest existed in informing the complainant whether or not it was investigating a particular company. The OFT asserted that a framework existed in consumer legislation for the OFT to publicise its work in a measured way; examples of this included press releases on bogus charity collectors, copies of which it had already provided to the complainant.
40. The Commissioner agrees with the OFT that there is a strong public interest inherent in ensuring the effectiveness of the OFT in carrying out its functions. To back up this point, the OFT has stated that some investigations would be prejudiced by disclosure of information relating to them. It has emphasized the importance of maintaining confidentiality around its investigations, as well as ensuring that it is able to correspond freely and frankly with traders. It has argued that traders would be discouraged from being open with the OFT in an investigation if they thought that information about the investigation would be likely to be disclosed. The Commissioner agrees with this analysis but stresses that section 31 must be applied on a case by case basis rather than in the blanket way in which the OFT has appeared to argue this point in its submissions to the Commissioner. However he accepts that the OFT has considered the public interest specifically in relation to this particular request for information.
41. The Commissioner also considers that there is a strong public interest in knowing about action taken by the OFT against specific traders so that the public may be warned and protected. In addition the Commissioner believes that disclosure about the work of a public body, such as the OFT, is desirable in that it heightens public awareness and understanding of its work. The OFT has acknowledged that the public would be better informed if it were told whether an investigation exists or not. The Commissioner agrees with that view and also with the OFT's analysis that disclosing information about whether the OFT had or had not taken action would promote "the transparency of, and accountability for, its decision making."
42. The Commissioner considers that, in respect of any information generated by the OFT and which might be subject to section 31 of the Act, there is a strong public interest both in confirming to the complainant whether information was held and in disclosing any such information. However he finds overall that the public interest in neither confirming nor denying its existence outweighs the public interest in disclosing whether or not the OFT holds the information.

The Decision

43. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the Act:

- Application of the exemption in section 44 (2), read in conjunction with 44 (1) (a), to that part of the information requested which might have come to the OFT in the exercise of its functions.
 - Subsequent application of the exemption in section 31 (3), read in conjunction with section 31(1) (g) and (2) (a) to (c), to any part of the requested information which might have been generated by the OFT.
44. However the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Both in its original refusal notice and on internal review, the OFT had erroneously applied the exemption in section 44 (2) (in conjunction with 44 (1)(a)), to any information which might have been generated by the OFT. It also failed to inform the complainant that it was seeking to rely on section 31 (3) and 31 (1) (g). This was in breach of section 17(1) (b) and (c) and 17(3) of the Act.
 - By failing to specify which subsection of each of the exemptions applied the public authority was in breach of section 17 (1) (b)

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 18th day of August 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

LEGAL ANNEX

Freedom of Information Act 2000

1. (1) Any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

2. (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
 - (a) the provision confers absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,section 1(1)(a) does not apply.
(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
 - (a) section 21,
 - (b) section 23,
 - (c) section 32,
 - (d) section 34,
 - (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
 - (f) in section 40—
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (g) section 41, and
 - (h) section 44.

17. (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies..

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

31. (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty’s prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the [1976 c. 14.] Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty’s prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.....

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

44. (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Enterprise Act 2002

Part 9

237 General restriction

(1) This section applies to specified information which relates to –

(a) the affairs of an individual;

(b) any business of an undertaking.

(2) Such information must not be disclosed –

(a) during the lifetime of the individual, or

(b) while the undertaking continues in existence,

unless the disclosure is permitted under this Part.

(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene –

(a) that subsection;

(b) any other enactment or rule of law prohibiting or restricting the disclosure of the information.

(4) Nothing in this Part authorises a disclosure of information which contravenes the Data Protection Act 1998 (c.29).

(5) Nothing in this Part affects the Competition Appeal Tribunal.

(6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.

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(1) Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of –

(a) Part 1,3, 4, 6, 7 or 8:

(b) an enactment specified in Schedule 14;

(c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.....

SCHEDULE 14 Specified functions

- Parts 2, 3, 4, 5, 6, 7, 8 and 11 of the Fair Trading Act 1973 (c. 41).
- Trade Descriptions Act 1968 (c. 29).
- Prices Act 1974 (c. 24).
- Consumer Credit Act 1974 (c. 39).
- Estate Agents Act 1979 (c. 38).
- Competition Act 1980 (c. 21).
- Consumer Protection Act 1987 (c. 43).
- Property Misdescriptions Act 1991 (c. 29).
- Timeshare Act 1992 (c. 35).
- Competition Act 1998 (c. 41).
- Chapter 3 of Part 10 and Chapter 2 of Part 18 of the Financial Services and Markets Act 2000 (c. 8).
- An order made under section 95 of that Act.